

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
 )  
PUBLIC UTILITIES COMMISSION )  
 )  
Instituting a Proceeding to Investigate the )  
Implementation of Feed-in Tariffs. )  
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**THE SOLAR ALLIANCE'S  
PRELIMINARY RESPONSES TO  
THRESHOLD LEGAL QUESTIONS IN APPENDIX C OF SCOPING PAPER**

**AND**

**CERTIFICATE OF SERVICE**

RILEY SAITO  
73-1294 Awakea Street  
Kailua-Kona, HI 96740  
Telephone No.: (808) 895-0646

for The Solar Alliance

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**THE SOLAR ALLIANCE'S  
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TO THE HONORABLE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII:

Pursuant to the Hawaii Public Utilities Commission's (the "Commission") directive, THE SOLAR ALLIANCE ("SA") hereby submits to the Commission its Preliminary Responses to the Threshold Legal Questions in Appendix C of Scoping Paper on feed-in tariffs, "Feed-in Tariffs: Best Design Focusing Hawaii's Investigation", issued by the Commission on December 11, 2008. Please note that because this investigatory proceeding has just begun, it would be premature for SA to have done a full legal analysis of the issues until it has an opportunity to review the many other information and documents yet to be submitted in this Docket in accordance with the procedural order and schedule yet to be developed by the Commission. As such, SA respectfully reserves its right to further elaborate and/or change its responses in its future submissions in this Docket.

## Threshold Issues (Legal)

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result. For example:

- a) Is this result permissible under current Hawaii statutes?

**Response:** An argument could be made that it is. HRS § 269-27.2 (c) states, "The rate payable by the public utility to the producer for the nonfossil fuel generated electricity supplied to the public utility shall be as agreed between the public utility and the supplier and approved by the public utilities commission. . ."

However, it is important to note that the statute also states, "[i]n the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the [C]ommission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy." (Emphasis added). Because TPL understanding is that the proposed feed-in tariff to be considered by the Commission in this proceeding would be solely applicable to "nonfossil fuel generated electricity" supplied to the HECO Companies, TPL believes that the language of HRS § 269-27.2(c) appears to restrict the Commission from approving and adopting a feed-in tariff that exceeds the utility's avoided cost.

- b) Does HRS § 269-27.2 create a ceiling on the feed-in tariff price?

**Response:** Arguably not, as long as the price is agreed upon by the public utility and the producer of the nonfossil fuel generated electricity, and approved by the Commission.

Again, its important to note, however that the statute language also appears to restrict the Commission from approving and adopting a feed-in tariff that exceeds the utility's avoided cost. See the response to part a above.

- c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed-in tariff price does not violate the statute?

**Response:** If it is decided in this proceeding that a feed-in tariff price that exceeds the utility's avoided cost is not permissible under current Hawaii statutes, the statute may have to be amended or

it could be made permissible if it can be demonstrated that the payments to be made by the utility at the proposed feed-in tariff price on average over the period in question will not exceed the utility's estimates of what its average avoided costs will be over the period in question.

2. As with any administrative agency decision, a Commission decision approving a feed-in tariff must be supported with substantial evidence.

- a) Focusing on the price term, what evidence is legally necessary? Consider these options, among others:
  - i) evidence of actual costs to develop similar projects in Hawaii
  - ii) generic (i.e., non-Hawaii) evidence of costs associated with each particular technology
  - iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost

**Response:** Any proposed feed-in tariff must be supported by methodologies and calculations that can be verified by all parties.

- b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it the Commission, under the procedural schedule proposed by the signatories?

**Response:** In regards to specific costs related to grid-connected photovoltaic systems, SA suggests that data contained in Tracking the Sun: The Installed Cost of Photovoltaics in the U.S. from 1998-2007 by Lawrence Berkeley National Laboratory is a good starting point. The report is based on an analysis of project-level installed cost data from nearly 37,000 residential and non-residential PV systems, obtained from PV incentive program administrators around the country. These systems total 363 MW or 76% of all grid-connected PV capacity installed in the U.S. by the end of 2007; representing the most comprehensive source of PV installed cost data in the United States. The Report describes installed cost trends over time, by system size, by state, by application and technology type.

3. Assume the Commission does create feed-in tariffs, which entitle the seller to sell to the utility at the tariff price.

- a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?

**Response:** Do not understand the distinction being made between "state law right to sell" and "PURPA right to sell".

PURPA requires that the public utility buy power from Qualifying Facilities offering its power at or below the public utility's avoided cost. PURPA does not say that the public utility cannot pay above its avoided cost.

Also, it is SA's understanding the other states have adopted feed-in tariffs that were above the public utility's avoided cost and no violation of PURPA has been cited.

- b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new "avoided cost" equal to cost it would have incurred under the state-mandated feed-in tariff?

**Response:** Do not understand the question. Is the seller a QF? Under what circumstances is the seller offering to sell and, why is it not selling pursuant to the state-mandated feed-in tariff?

- c) If the price associated with a feed-in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?

**Response:** In a perfect world, the tariff offers the developer more certainty in regards to price, thus the developer does not have to spend time negotiating with the public utility over the public utility's avoided costs. This certainty in turn would lead to reducing the time it takes to obtain a Power Purchase Agreement ("PPA") with the public utility and also reduce the cost of financing the renewable project. Also, since the Commission has already approved the feed-in tariff with input from the Consumer Advocate, it will also reduce the time to get the PPA approved by the Commission.

- d) Please offer any other comments concerning the legal and practical relationship between the feed-in tariff and existing PURPA rights and obligations.

**Response:** Feed-in tariffs and existing PURPA rights are two distinct mechanisms to encourage renewable energy in the State of Hawaii, and one should not be eliminated because of the adoption of the other. Nor, should either in encouraging renewable energy in the State of Hawaii be used to curtail and/or discourage existing renewable energy projects in the State of Hawaii.

Respectfully submitted.

DATED: Honolulu, Hawaii, January 12, 2009.

A handwritten signature in black ink, appearing to read 'R. Saito', is written over a horizontal line.

RILEY SAITO

for The Solar Alliance

CERTIFICATE OF SERVICE

The foregoing Preliminary Responses to the Threshold Legal Questions in Appendix C of Scoping Paper was served on the date of filing by hand delivery or electronically transmitted to each such Party.

CATHERINE P. AWAKUNI  
EXECUTIVE DIRECTOR  
DEPT OF COMMERCE & CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P.O. Box 541  
Honolulu, Hawaii 96809

2 Copies  
Via Hand Delivery

DEAN MATSUURA  
MANAGER  
REGULATORY AFFAIRS  
HAWAIIAN ELECTRIC COMPANY, INC.  
P.O. Box 2750  
Honolulu, HI 96840-0001

Electronically transmitted

JAY IGNACIO  
PRESIDENT  
HAWAII ELECTRIC LIGHT COMPANY, INC.  
P. O. Box 1027  
Hilo, HI 96721-1027

Electronically transmitted

EDWARD L. REINHARDT  
PRESIDENT  
MAUI ELECTRIC COMPANY, LTD.  
P. O. Box 398  
Kahului, HI 96732

Electronically transmitted

THOMAS W. WILLIAMS, JR., ESQ.  
PETER Y. KIKUTA, ESQ.  
DAMON L. SCHMIDT, ESQ.  
GOODSILL, ANDERSON QUINN & STIFEL  
Alii Place, Suite 1800  
1099 Alakea Street  
Honolulu, Hawaii 96813

Electronically transmitted

ROD S. AOKI, ESQ.  
ALCANTAR & KAHL LLP

Electronically transmitted

120 Montgomery Street  
Suite 2200  
San Francisco, CA 94104

MARK J. BENNETT, ESQ.  
DEBORAH DAY EMERSON, ESQ.  
GREGG J. KINKLEY, ESQ.  
DEPARTMENT OF THE ATTORNEY GENERAL  
425 Queen Street  
Honolulu, Hawaii 96813  
Counsel for DBEDT

Electronically transmitted

CARRIE K.S. OKINAGA, ESQ.  
GORDON D. NELSON, ESQ.  
DEPARTMENT OF THE CORPORATION COUNSEL  
CITY AND COUNTY OF HONOLULU  
530 South King Street, Room 110  
Honolulu, Hawaii 96813

Electronically transmitted

LINCOLN S.T. ASHIDA, ESQ.  
WILLIAM V. BRILHANTE JR., ESQ.  
MICHAEL J. UDOVIC, ESQ.  
DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF HAWAII  
101 Aupuni Street, Suite 325  
Hilo, Hawaii 96720

Electronically transmitted

MR. HENRY Q CURTIS  
MS. KAT BRADY  
LIFE OF THE LAND  
76 North King Street, Suite 203  
Honolulu, Hawaii 96817

Electronically transmitted

MR. CARL FREEDMAN  
HAIKU DESIGN & ANALYSIS  
4234 Hana Highway  
Haiku, Hawaii 96708

Electronically transmitted

MR. WARREN S. BOLLMEIER II  
PRESIDENT  
HAWAII RENEWABLE ENERGY ALLIANCE  
46-040 Konane Place, #3816  
Kaneohe, Hawaii 96744

Electronically transmitted

DOUGLAS A. CODIGA, ESQ.  
SCHLACK ITO LOCKWOOD PIPER & ELKIND

Electronically transmitted



TOPA FINANCIAL CENTER  
745 Fort Street, Suite 1500  
Honolulu, Hawaii 96813  
Counsel for BLUE PLANET FOUNDATION

MR. MARK DUDA  
PRESIDENT  
HAWAII SOLAR ENERGY ASSOCIATION  
P.O. Box 37070  
Honolulu, Hawaii 96837

Electronically transmitted

JOEL K. MATSUNAGA  
HAWAII BIOENERGY, LLC  
737 Bishop Street, Suite 1860  
Pacific Guardian Center, Mauka Tower  
Honolulu, Hawaii 96813

Electronically transmitted

KENT D. MORIHARA, ESQ.  
KRIS N. NAKAGAWA, ESQ.  
SANDRA L. WILHIDE, ESQ.  
MORIHARA LAU & FONG LLP  
841 Bishop Street, Suite 400  
Honolulu, Hawaii 96813  
Counsel for HAWAII BIOENERGY, LLC  
Counsel for MAUI LAND & PINEAPPLE COMPANY, INC.

Electronically transmitted

MR. THEODORE E. ROBERTS  
SEMPRA GENERATION  
101 Ash Street, HQ 12  
San Diego, California 92101

Electronically transmitted

MR. CLIFFORD SMITH  
MAUI LAND & PINEAPPLE COMPANY, INC.  
P.O. Box 187  
Kahului, Hawaii 96733

Electronically transmitted

MR. ERIK KVAM  
CHIEF EXECUTIVE OFFICER  
ZERO EMISSIONS LEASING LLC  
2800 Woodlawn Drive, Suite 131  
Honolulu, Hawaii 96822

Electronically transmitted

JOHN N. REI  
SOPOGY INC.  
2660 Waiwai Loop  
Honolulu, Hawaii 96819

Electronically transmitted

GERALD A. SUMIDA, ESQ.  
TIM LUI-KWAN, ESQ.  
NATHAN C. NELSON, ESQ.  
CARLSMITH BALL LLP  
ASB Tower, Suite 2200  
1001 Bishop Street  
Honolulu, Hawaii 96813  
Counsel for HAWAII HOLDINGS, LLC,  
dba FIRST WIND HAWAII

Electronically transmitted

MR. CHRIS MENTZEL  
CHIEF EXECUTIVE OFFICER  
CLEAN ENERGY MAUI LLC  
619 Kupulau Drive  
Kihei, Hawaii 96753

Electronically transmitted


MR. HARLAN Y. KIMURA, ESQ.  
CENTRAL PACIFIC PLAZA  
220 South King Street, Suite 1660  
Honolulu, Hawaii 96813  
Counsel for TAWHIRI POWER LLC

Electronically transmitted

SANDRA-ANN Y.H. WONG, ESQ.  
ATTORNEY AT LAW, A LAW CORPORATION  
1050 Bishop Street, #514  
Honolulu, HI 96813  
Counsel for ALEXANDER & BALDWIN, INC.,  
Through its division, HAWAIIAN COMMERCIAL & SUGAR COMPANY

Electronically transmitted

DATED: Honolulu, Hawaii, January 12, 2009.

  
\_\_\_\_\_  
RILEY SAITO

for The Solar Alliance